

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BOW HERBERT and NANCY HERBERT,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE  
TAX COURT OF THE UNITED STATES

RESPONDENT'S PETITION FOR REHEARING AND  
FOR CLARIFICATION OF OPINION

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MITCHELL ROGOVIN,  
Assistant Attorney General.

LEE A. JACKSON,  
ROBERT N. ANDERSON,  
CAROLYN R. JUST,  
Attorneys,  
Department of Justice,  
Washington, D. C. 20530.

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FOR THE NINTH CIRCUIT

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No. 19,935

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To the Honorable, the United States Court of Appeals for the Ninth  
Circuit and the Judges Thereof:

Comes now the Commissioner of Internal Revenue, the respondent in the above-entitled cause, by his attorneys, and presents this, his petition for a rehearing and for clarification of opinion, in the above-entitled cause in which an opinion and judgment were rendered on December 30, 1966, by this Court (Circuit Judges Jertberg and Merrill), with District Judge Tavares dissenting.

The Commissioner respectfully submits that the majority opinion fell into error in the following respects:

1. The majority opinion states (Slip Op. 7):

The general rule is that the burden of proof is on the Commissioner to establish that the taxpayer received income. However, the Commissioner's determination of a deficiency satisfied such burden since the determination made by the Commissioner is presumptively correct. The taxpayer then has the

burden of overcoming this presumption by a preponderance of the evidence. American Pipe and Steel Corp. v. Commissioner, 243 F. 2d 125 (9th Cir.), cert. denied, 355 U.S. 906 (1957). When the taxpayer has overcome the presumption by competent and relevant evidence, the presumption disappears and drops out of the case. J. M. Perry Co. v. Commissioner, 120 F. 2d 123, 124 (9th Cir. 1941); Clark v. Commissioner, 266 F. 2d 698, 706 (9th Cir. 1959); Cohen v. Commissioner, 266 F. 2d 5 (9th Cir. 1959); Hemphill Schools, Inc. v. Commissioner, 137 F. 2d 961 (9th Cir. 1943).

While the respondent recognizes that the statement made in the first sentence of the excerpt quoted above is qualified by and must be read in context with the remainder of the paragraph in which it is set forth, namely, that the taxpayer has to overcome the presumption of correctness in favor of the Commissioner by a preponderance of the evidence before the duty of going forward with the evidence shifts to the Commissioner, statements in later portions of the opinion lend confusion and uncertainty with respect to the true meaning of the majority opinion in this connection. Thus we respectfully submit that the majority would appear to be in error when it subsequently states (Slip Op. 9):

The burden of proof was not upon the taxpayer to show that he had no income. The burden was upon the Commissioner to establish that the taxpayer received the money as income. It appears to us that the Tax Court has confused the burden of establishing receipt of income with the burden of supporting allowable deductions from income. In the former case the burden is on the Commissioner, and in the latter case the burden is upon the taxpayer.

A similar statement is made by the majority at page 10, lines 6-9:

In our view the Tax Court erred in placing the burden of proof on the taxpayer to establish that he had no income instead of placing upon the Commissioner, where it belonged, the burden of establishing that petitioner realized income.

These last two excerpts from the majority opinion suggested that the majority is adopting a position as to the burden of proof in cases of this type 1/ which conflicts with this Court's prior opinions in American Pipe & Steel Corp. v. Commissioner, 243 F. 2d 125; Todd v. Commissioner, 153 F. 2d 553; and Lawrence v. Commissioner, 143 F. 2d 456; and with opinions of other courts in Welch v. Helvering, 290 U.S. 111, 115; Thrower v. Commissioner, 330 F. 2d 614 (C.A. 5th), affirming, per curiam, decision of December 11, 1962 (P-H Memo T.C., par. 62,291); United Aniline Co. v. Commissioner, 316 F. 2d 701, 704 (C.A. 1st); O'Dwyer v. Commissioner, 266 F. 2d 575, 578 (C.A. 4th); Polizzi v. Commissioner, 265 F. 2d 498, 501-502 (C.A. 6th); Hoefle v. Commissioner, 114 F. 2d 713, 714, 715 (C.A. 6th). See also 9 Mertens, Law of Federal Income Taxation (Rev.), Sec. 50.61; IX Wigmore on Evidence (3d ed.), Secs. 2489 and 2540; Rule 32, Rules of Practice of the Tax Court of the United States (Rev. 1958, 1964 ed.). For indications of the confusion apparently resulting from the conflicting statements by the majority see 12 Roehner on Federal Taxation, No. 1, dated January 13, 1967; 1967 P-H Federal Taxes Report Bulletin of February 9, 1967, par. 60,055.

In view of the foregoing, the Commissioner respectfully prays that a clarification of the opinion in this respect might be made.

2. Although the majority states (Slip Op. 8) that it does not base its determination on testimony of the taxpayer which the Tax Court characterized as incredible, it is respectfully submitted that, aside from

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1/ Contrary to the situation here, the Commissioner would, of course, initially have the burden of proof (1) in fraud cases, pursuant to sec. 7454 of the Internal Revenue Code of 1954; (2) in transferee cases, pursuant to sec. 6902 of the 1954 Code; and (3) where he affirmatively pleads new matter. 9 Mertens, Law of Federal Income Taxation, secs. 50.64 -50.69.

